Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

Micaela Zacatelco Hijuilt;
Jorge Rojas Cortez,

Petitioners,

v.

Eric H. Holder, Jr., United States Attorney General,

Respondent,

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

To establish eligibility for Cancellation of Removal, 8 U.S.C. §1229b(b), Mr. Rojas and Ms. Zacatelco testified to the hardship that will be faced by their United States Citizen children if they are removed to Mexico. Mr. Rojas and Ms. Zacatelco spoke of the loss of both present and future educational opportunities, particularly for their exceptionally gifted daughter, in Mexico, where the schools have much lower academic standards and resources. The Immigration Judge found that the standard for "exceptional and extremely unusual hardship" was not met and the Board of Immigration Appeals affirmed. The United States Court of Appeals for the Second Circuit denied review based on precedent that the hardship requirement is a discretionary determination. However, the plain statutory language does not make hardship discretionary, and the courts have jurisdiction as they do for the other eligibility requirements of cancellation of removal.

The First Question Presented is:

1. Whether the "exceptional and extremely unusual hardship" requirement for Cancellation of Removal, 8 U.S.C. §1229b, is subject to judicial review.

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit denying the Petition for Rehearing en Banc was not published in the Federal Reporter but may be found at *Zacatelco v. Holder,* No. 09-2832-ag (2d Cir. Feb. 4, 2010), reprinted at Petitioner's Appendix (hereinafter "P.A.") 32a.

The opinion of the United States Court of Appeals for the Second Circuit, denying Ms. Zacatelco and Mr. Rojas' Petition for Review on their claims for Cancellation of Removal, was not published in the Federal Reporter but may be found at *Zacatelco v. Holder,* No. 09-2832-ag (2d Cir. Nov. 13, 2009), P.A. 17a.

The decision of the Board of Immigration Appeals dismissing the appeal may be found at *In re Jorge Rojas Cortes, Micaela Zacatelco Hijuilt,* No. A98 693 728 and No. A98 693 729 (B.I.A. June 5, 2009), aff'g No. A98-693-729 (Immig. Ct. Hartford, Conn. July 8, 2008), P.A. 20a. The order of the Executive Office for Immigration Review, Hartford, Connecticut, denying Ms. Zacatelco and Mr. Rojas' applications for Cancellation of Removal may be found at *In re Jorge Rojas Cortes, Micaela Zacatelco Hijuilt,* No. A98 693 728 and No. A98 693 729 (Immig. Ct. Hartford, Conn. July 8, 2008), P.A. 24a.

Jurisdiction

The United States Court of Appeals for the Second Circuit denied Ms. Zacatelco and Mr. Rojas' Petition for Review on November 13, 2009. P.A. 16a.

On February 4, 2010, the Court of Appeals denied Mr. Rojas and Ms. Zacatelco's motion for rehearing *en banc*. P.A. 31a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions

Title 28, United States Code §2350 provides in relevant part:

> An order granting or denying an interlocutory injunction under section 2349 (b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254 (1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

Statement of the Case

Both Mr. Jorge Rojas Cortez and Ms. Micaela Zacatelco Hijuilt are natives and citizens of Mexico. P.A. 24a. Mr. Rojas has been in the United States since June 1, 1990, and has only once left the country briefly since first entering the United States nearly twenty years ago. P.A. 24a. On December 27, 2000, Mr. Rojas left the United States for a short period of time to see his father, who had just passed away in Mexico. P.A. 24a. Mr. Rojas returned to the

United States by January 2001. P.A. 24a. Ms. Zacatelco entered the United States without inspection in August 1992, and has not left the country since her entry. P.A. 24a. The two were married on February 6, 1998. P.A. 25a. Mr. Rojas is employed as a mechanic. P.A. 25a. Ms. Zacatelco spends most of her time taking care of the children, but also works part-time as a cleaner with her husband. P.A. 25a. Both Mr. Rojas and Ms. Zacatelco' have most of their immediate family in the United States. Six of Mr. Rojas' eight siblings are in the United States. P.A. 24a-25a. Ms. Zacatelco only has a brother and her father in Mexico. P.A. 26a. Together, Mr. Rojas and Ms. Zacatelco have two United States Citizen children, Leslie and Jorge Rojas. P.A. 25a.

Jorge Rojas, born May 7, 2002, is seven years old and is a good student who learns things with ease. P.A. 25a. Leslie Rojas, born September 28, 1998, is eleven years old and is an exceptional student in the Talented and Gifted program ("TAG") at school. P.A. 25a. The TAG program is reserved only for students who demonstrate a high level of achievement and potential on government-administered examinations. P.A. 25a. This program offers Leslie unique opportunities to further her academic development and earn scholarships for higher education. As part of TAG, Leslie is placed on an advanced and separate track in school. Leslie aspires to study science and engineering; she hopes to one day work for NASA, perhaps as an astronaut. As long as she is in the United States, Leslie can stay in the TAG program. P.A. 29a. As students are identified in the third grade for the TAG program,

there is a possibility that Jorge may also be identified for this program. P.A. 29a.

On July 8, 2008, the Immigration Judge denied Mr. Rojas and Ms. Zacatelco's application for Cancellation of Removal under Section 240A(b)(1) of the Immigration and Nationality Act (INA). The Board of Immigration Appeals affirmed, without opinion, the decision of the Immigration Judge on June 5, 2008. The Board did not consider the Petitioners' claims that the Immigration Judge failed to consider the loss of educational opportunity for an exceptionally gifted child with the same significance as if the child were to suffer a physical, emotional, or psychological hardship. A timely appeal was made to the Second Circuit Court of Appeals. However, on November 13, 2009, the Second Circuit Court of Appeals granted the government's motion to dismiss for lack of jurisdiction, dismissing the petition for review. The Petitioners petitioned for a rehearing en banc, which was denied on February 4, 2010.

Eligibility for cancellation of removal requires: (1) physical presence in the U.S. for not less than 10 years immediately preceding the date of the application; (2) good moral character; (3) no convictions for an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3); and (4) establishing that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a United States Citizen or lawful permanent resident. *See* 8 U.S.C. §1229b(b)(1).

At the hearing of July 8, 2008, the central issue before the Immigration Judge was whether the Petitioners established that their removal would result in "exceptional and extremely unusual hardship" to their United States Citizen children. P.A. 27a. Both Petitioners testified that their two United States Citizen children are bright and eager learners; their daughter excels in school and has already been identified as an exceptional student who is part of the Talented and Gifted program at school. P.A. 25a. Their son has been doing well and will be evaluated for the gifted program at the proper time. The Petitioners further testified that their children would not have the same opportunities for academic development and achievement in Mexico. P.A. 25a-26a. The quality of education available to the children in Mexico would not be the same - or even substantially similar - to what they have in the United States. If forced to move to Mexico, both Leslie and Jorge will have to attend lower level schools; all the good schools are far away and would require traveling long distances, possibly by multiple buses, each way. Though United States Citizens, Leslie and Jorge will miss the opportunities offered by their homeland if they are uprooted from the only lives they have ever known and transplanted in Mexican soil.

The Immigration Judge found that the Petitioners did not meet the hardship standard under 8 U.S.C. §1229b(b) because "this is the hardship that typically happens when children have to go back with their parents to a different country." P.A. 29a. The BIA affirmed the IJ's decision without opinion. P.A. 22a. The Petitioners appealed the decision to the United

States Court of Appeals for the Second Circuit, arguing that the IJ held him to higher standard than required by statue. The Second Circuit dismissed the Petitioner's appeal, relying on 8 U.S.C. 1252(a)(2)(B)(i) which precludes judicial review of "any judgment regarding the granting of relief under . . . 8 U.S.C. §1229b."

However, in *INS v. St. Cyr*, this Court held that the courts are not precluded from reviewing whether an alien is *eligible* for discretionary relief. 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). In line with *St. Cyr*, the Second Circuit has held that "[o]btaining ... cancellation of removal is a two-step process. First, an alien must prove eligibility by showing that he meets the statutory eligibility requirements. Second, assuming an alien satisfies the statutory requirements, the Attorney General in his discretion decides whether to grant or deny relief." *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir.2006)(per curiam)(citiations omitted); *see also*, *Sepulveda v. Gonzales*, 407 F.3d 59, 62-63 (2d Cir.2005).

However, despite the legal and statutory authority providing for review of eligibility determinations, the Second Circuit, and each of its sister circuit courts, has held that the requirement of "exceptional and extremely unusual hardship" is not subject to judicial review. The IJ's decision that the children would not suffer exceptional and extremely unusual hardship is a determination as to eligibility for cancellation of removal. Therefore, the Second Circuit's decision is contrary to this Court's finding that there is a "distinction between eligibility for discretionary relief, on the one hand, and the

favorable exercise of discretion, on the other hand." *St. Cyr*, 533 U.S. at 307. The requirement of "exceptional and extremely unusual hardship" is an eligibility requirement for the discretionary relief of Cancellation of Removal and is subject to judicial review. *See, Id.*

Reasons for Granting the Writ

I. This Court should grant certiorari to consider whether "exceptional and extremely unusual hardship" is reviewable as an eligibility requirement for cancellation of removal under 8 U.S.C.1229b.

In the recent decision of *Kucana v. Holder*, this Court held that 8 U.S.C. 1252(a)(2)(B)'s proscription of judicial review applies only to the Attorney General's determinations made discretionary by statute. *Kucana v. Holder*, 130 S.Ct. 827, 837 (2010) (Docket No. 08-911). However, the U.S. Court of Appeals for the Second Circuit dismissed the underlying Petition for Review based on circuit precedent that the hardship requirement for cancellation of removal was a discretionary determination, and therefore beyond the Court's jurisdiction to review. *See* 8 U.S.C. §1229b(b)(1)(D); 8 U.S.C. §1252(a)(2)(B). The statute creating cancellation of removal contains four requirements that must be established in order for an alien to be eligible for such relief. Once an alien has established eligibility, then the statute provides that the Attorney General may exercise his discretion to grant or deny relief. *See* 8 U.S.C. §1229b(b)(1). The requirements for cancellation, including whether the

alien has established hardship, are non-discretionary; the statutory language does not indicate that hardship is discretionary, other sections of the Immigration and Nationality Act specifically use language indicating discretion, and the BIA has created a legal standard for determining hardship. Therefore the Petition for Writ of Certiorari must be granted to interpret the statutory language of 8 U.S.C. 1229b(b)(1) and the requirement of "exceptional and extremely unusual hardship."

A. The Courts have judicial review over questions of law relating to cancellation of removal including whether an alien is eligible for relief.

The standard for Cancellation of Removal, under 8 U.S.C. §1229b, states that the Attorney General may cancel removal of a nonpermanent resident if the alien:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under section 1182 (a)(2), 1227 (a)(2), or 1227 (a)(3) of this title, subject to paragraph (5); and
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

See 8 U.S.C. §1229b(b). These requirements must be met before an Immigration Judge may exercise his discretion to consider granting Cancellation of Removal relief. *See* 8 U.S.C. §1229b(b)(1).

The IJ's decision is subject to judicial review as regulated by 8 U.S.C. §1252. The jurisdiction stripping provision of § 1252(a)(2)(B)(i) states that a Court does not have jurisdiction to review "any judgment regarding the granting of relief under ... [8 U.S.C. § 1229b]." However, § 1252(a)(2)(D) also states,

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Therefore, the courts have jurisdiction over questions of law and constitutional claims relating to orders of removal, despite the fact that jurisdiction is otherwise precluded for discretionary decisions, including cancellation of removal.

In *INS v. St. Cyr*, this Court held that the courts are not precluded from reviewing whether an alien is *eligible* for discretionary relief. 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). In *St.Cyr*, a permanent resident alien filed a petition for habeas corpus, seeking review of the BIA's decision that he was removable because he pleaded guilty to aggravated felony and was ineligible to apply for discretionary relief from deportation. The United States District Court for the District of Connecticut

determined that it had jurisdiction and the Circuit Court affirmed. Following a grant of certiorari, the Supreme Court, Justice Stevens, held that discretionary relief under § 212(c) was available for aliens whose convictions were obtained through plea agreements and who would have been eligible for relief at the time of their plea under the law then in effect. *Id.* at 326. More importantly to the case at hand, the Court held that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) – which includes §1252 - did not deprive courts of jurisdiction to review the alien's habeas petition. *Id.* at 312 – 313.

In arriving at its decision, the Court opined, "[t]raditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." *Id.* at 307. Eligibility for relief, the Court found, is "governed by specific statutory standards" and provides for "a right to a ruling on an applicant's eligibility, even though the actual granting of relief was . . . a matter of grace." *Id.* at 308 (*citing Jay v. Boyd*, 351 U.S. 345, 353-354, 76 S.Ct. 919, 100 L.Ed. 1242 (1956)). The Court relied on its opinion in *Accardi*, where it held that "a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law." *Id.* (*citing*, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954)).

Following *St. Cyr*, the Circuit Courts have held that 8 U.S.C. §1252 does not strip the courts of jurisdiction over questions of law relating to cancellation of removal, including whether an alien is eligible for relief. In *Sepulveda v. Gonzales* the

Second Circuit held that "8 U.S.C. § 1252(a)(2)(B) does not strip courts of jurisdiction to review nondiscretionary decisions regarding an alien's *eligibility* for the relief specified in 8 U.S.C. § 1252(a)(2)(B)(i)." 407 F.3d 59, 62-63 (2d Cir.2005)(emphasis added); *see also, Rodriguez*, 451 F.3d at 62. Other Circuit Courts have agreed. *See, e.g., Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir.2008)(Holding that the court retains jurisdiction to review the nondiscretionary determinations underlying a denial of an application for cancellation of removal including whether the IJ properly applied the law to the facts in determining an individual's eligibility); *Hashish v. Gonzales*, 442 F.3d 572 (7th Cir.2006)(Holding that the court has jurisdiction to review nondiscretionary determinations relating to an alien's eligibility for relief); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir.2003)(Holding the same); *Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir.2006)(Holding that jurisdiction exists to consider whether an alien meets the physical presence requirement.); *Bermudez v. Holder*, 586 F.3d 1167 (9th Cir.2009)(Finding that whether a particular conviction is a deportable offense is a question of law that the Court reviews *de novo*). The circuit court precedent, providing for review of eligibility for cancellation of removal, squares with the language of §1252 and the holding in *St. Cyr*.

As a result, "[o]btaining ... cancellation of removal is a two-step process. First, an alien must prove eligibility by showing that he meets the statutory eligibility requirements. Second, assuming an alien satisfies the statutory requirements, the Attorney General in his discretion decides whether

to grant or deny relief." *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir.2006) (per curiam) (citations omitted); *see also Mendez v. Holder*, 566 F.3d 316, 319 (2d Cir.2009)(*citing St. Cyr*, 533 U.S. at 307). The two step process requires an alien establish eligibility before the Court utilizes its discretion to grant or deny cancellation of removal. Therefore, an eligibility decision, which is subject to judicial review, is distinct from an exercise of discretion.

B. A plain reading of 8 U.S.C. §1229b(b)(1)(D) shows that the hardship requirement is not a discretionary determination.

The plain language of the "exceptional and extremely unusual hardship" requirement shows that such a determination is not discretionary. Furthermore, the BIA has created a legal standard to apply in making a hardship determination -- an indication that such a decision is not discretionary. Likewise, Congress has used specific language to invoke the Attorney General's discretion in other sections of the Immigration and Nationality Act (INA), and such language is purposefully excluded from the requirement of "exceptional and extremely unusual hardship."

The Second Circuit has incorrectly held that the hardship requirement is not reviewable. *See, e.g., Barco-Sandoval v. Gonzales*, 516 F.3d 35, 39 (2d Cir.2008)(Holding that whether exceptional and extremely unusual hardship is present is committed to the discretion of the Attorney General and is beyond the court's jurisdiction to review); *see also Fernandez v. Gonzales*, 439 F.3d 592, 603-04 (9th Cir.2006)(holding the same); *Sung v. Keisler*, 505

F.3d 372 (5th Cir.2007)(holding the same); *Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219 (11th Cir.2006)(holding the same). The Second Circuit bases its decision on a finding that exceptional and extremely unusual hardship is discretionary.

To the contrary, the language of §1229b does not indicate that "exceptional hardship" is a discretionary determination. The plain language of §1229b does not differentiate between each of the four requirements. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809(1989)("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") As with the other statutory requirements, a decision as to exceptional hardship must be decided using the applicable legal standards.

Under the Administrative Procedure Act, 5 U.S.C. 701(a)(2), a decision is committed to agency discretion when there is "no law to apply." *See Heckler v. Chaney*, 470 U.S.C 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d. 714 (1985)(internal quotations omitted). However, the BIA has created a legal standard for reviewing a hardship determination. The legal standard was set forth by the Board of Immigration Appeals in a trifecta of decisions. *See and compare, In Re: Gonzalez Recinas*, 23 I&N 467 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); and *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002).

In *Recinas*, the BIA issued a detailed decision that analyzed its past precedents on the issue of Cancellation of Removal and determined that it was not "so restrictive that only a handful of applicants, such as those qualifying relatives with a serious medical condition, will qualify for relief." *Id.* at 470.

The BIA emphasized that "the alien need not show that such hardship would be unconscionable." *Id.* at 468 (citations and quotations omitted). In contrasting the factual situations of its prior decisions, *Monreal* and *Andazola,* the BIA determined that an IJ should nod toward granting Cancellation where it is not practicable for the United States Citizen child to live in the foreign country because it would mean living in poverty, not being able to communicate in the native language, and separation from family and established support networks. *Recinas,* 23 I&N at 471. The Board also recognized the importance of considering whether the United States Citizen would ever be able to have his parent visit again in the United States. *Id.* at 472. In a very balanced decision, the BIA distinguished between situations where denying an application for cancellation would mean a simple relocation for the United States Citizen child and a lateral relocation. Therefore, the hardship requirement is not a purely discretionary determination because there is law to apply.

As this Court recently held in *Kucana v. Holder,* section 1252(a)(2)(B)'s proscription of judicial review applies only to Attorney General determinations made discretionary by statute. *Kucana v. Holder,* 130 S.Ct. 827, 837 (2010). The requirement of exceptional and extremely unusual hardship in 8 U.S.C. §1229b is not made discretionary by the language of the statute. The alien must establish hardship, under the legal standard articulated by the BIA, and then, if all the requirements are met, the statute provides that the Attorney General may use his discretion to grant or deny relief.

Other areas of the INA use language that specifically implicates the Attorney General's discretionary authority. "In contrast, other sections of the INA require that an alien establish extreme hardship 'in the opinion of the Attorney General' or 'to the satisfaction of the Attorney General.' This language was used for suspension of deportation, the predecessor of the current cancellation of removal law. But it was not included with respect to cancellation. *See* 8 U.S.C. 1254(a)(1)(suspension of deportation)(repealed 1996); 8 U.S.C. §1182(i)(1)(§212(i) relief)." *Mendez v. Holder*, 566 F.3d 316, 321 (2d Cir.2009). On the other hand, the hardship requirement simply states that an alien must "establish[] that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. §1229b(b)(1)(D). This Court has held that where Congress specifically includes particular language in one section of a statute but omits it in another "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983); *see also, Mendez*, 566 F.3d at 321 (Citing the decision of *Russello* for the proposition that the language which is lacking as to cancellation of removal suggests a difference between the statutes.) In addition, the Court generally entertains a "presumption favoring interpretations of statutes [to] allow judicial review of administrative action." *Reno v. Catholic Social Services*, Inc., 509 U.S. 43, 63-64 (1993)(internal quotations omitted).

In *Mendez*, the Second Circuit opined, "Were we operating on a clean late, we would be inclined to hold that the question of whether an alien has established exceptional and extremely unusual hardship is a determination that we have jurisdiction to review . . . We are, however, bound by prior decisions of our Court." 566 F.3d at 322. Therefore, the Petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari to resolve whether "exceptional and extremely unusual hardship" is a non-discretionary determination subject to judicial review.

Conclusion

The Petition for writ of certiorari should be granted.

Respectfully submitted
for the Petitioner,

JORGE ROJAS and MICAELA ZAGATELCO HIJUILT

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APPENDIX A

BIA
Straus, I.J.
A 098-693-728
A 098-693-729

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of November, two thousand nine,

Present:

Dennis Jacobs,
Chief Judge,
Pierre N. Leval,
Circuit Judge,
George B. Daniels,*
District Judge

Seal

UNITED STATES COURT OF APPEALS
FILED
NOV 13 2009
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Micaela Zacatelco Hijuilt, Jorge Rojas Cortes,

Petitioners,

v. 09-2832-ag

Eric H. Holder, Jr., United Status Attorney General,

Respondent.

The Government moves to dismiss the petition for review for lack of jurisdiction. Upon due consideration, it is hereby ORDERED that the Government's motion is GRANTED and the petition for review is DISMISSED. *See De La Vega v. Gonzales,* 436 F.3d 141, 144 (2d Cir. 2006) (holding that this Court lacks jurisdiction to review the BIA's discretionary determination whether to grant cancellation of removal under 8 U.S.C. § 1229b); *Barco-Sandoval v. Gonzales,* 516 F.3d 35, 39-40 (2d Cir. 2008) (reaffirming *De La Vega).* Although this Court retains jurisdiction to review

* George B. Daniels, of the United States District Court for the Southern District of New York, sitting by designation.

"constitutional claims and questions of law," *see* 8 U.S.C. § 1252(a)(2)(D), the Petitioners' proposed claims are "essentially a quarrel about fact-finding or the exercise of discretion" expressed in " the rhetoric of a constitutional claim or question of law," *Barco-Sandoval, 516* F.3d at 39 (internal quotations marks and alteration omitted). It is further

ORDERED that the pending motion for a stay of removal is DENIED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: S/_____

APPENDIX B

Seal

U.S. Department of Justice

Department of Justice
Executive Office for
Immigration Review

Executive Office for
Immigration Review

*Board of Immigration
Appeals
Office of the Clerk*

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06103-3060

Name: ZACATELCO HIJUILT, MICAELA
A098-693-729
Riders: 098-693-728
Date of this notice: 6/5/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,
S/
Donna Carr
Chief Clerk

Enclosure
Panel Members:
Hess, Fred

Seal

U.S. Department of Justice

Executive Office for
Immigration Review

*Board of Immigration
Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
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Hartford, CT 06103-3060

Name: ZACATELCO HIUILT, MICAELA
098-693-729
Riders: 098-693-728

Date of this notice: 6/5/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review

of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

S/

Donna Carr
Chief Clerk

Enclosure
Panel Members:
HESS, Fred

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the
Board of
Immigration
Appeals

Falls Church, Virginia 22041

File: A098 693 728 - Hartford, CT
A098 693 729

Date: JUN 05 2009

In re: JORGE ROJAS CORTES
MICAELA ZACATELCO HIJUILT

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Glenn L. Formica, Esquire

APPLICATION: Cancellation of removal under section 240A(b)

ORDER: The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R § 1003.1 (e)(4).

S/ of Frederick D. Hess

FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FR IMMIGRATION REVIEW
IMMIGRATION COURT
Hartford, Connecticut

File A 098 693 728 July 8, 2008
A 098 693 729

In the Matters of

JORGE ROJAS CORTEZ,)
MICAELA ZACATELCO HIJUILT,)

IN REMOVAL PROCEEDINGS

Respondents

Charge: Section 212 (a)(6)(A)(i) of the Immigration and Nationality Act – present without having been admitted or paroled;

Application: Cancellation of removal under Section 240b(1) of the Act.

On Behalf of the Respondents:	On Behalf of DHS:
Judith Sporn, Esquire 20 Post Road West, Suite 301 Wesport, CT 06880	Ryan A. Alger, Esquire Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Introduction

The respondents are both charged in the Notices to Appear with being natives and citizens of Mexico who are present without having been admitted or paroled. The Court would also note that they are married. Based on the admissions and concessions, the Court finds that removability has been established by clear and convincing evidence. Both respondents have applied for cancellation of removal under Section 240A(b) (1) of the Act.

Statement of the Facts

The male respondent was born in Puebla, Mexico, on August 14, 1975. The female respondent was also born in Puebla on April 10th of 1978. The respondent described Puebla as a fairly large city. The male respondent states that his mother died when he was 5, and his father died in December of 2000. He did leave the United States in December of 2000 when his father died, and he claims he returned to the United States illegally at the end of January of 2001. The female respondent claims she entered the United States without inspection on August 14 of 1992 and claims she has never left the country.

The male respondent indicates that he has six siblings in the United States. Two are lawful permanent residents, one is a U.S. citizen, and apparently, the other three are out of status. He also states that two of his brothers actually live with him in Bridgeport. He states that he has two

married sisters with children who live in Puebla. He states that he does visit frequently with his sibling in Queens, and visits once a year with the two brothers who live in Houston.

He was arrested in 1996 for having sexual relations with a 13-year-old girl. Apparently, the charges were dismissed in February of 1997.

He states that he works as a mechanic at a car wash since December of 2000 and earns $750 a week. He and his wife also work part-time as cleaners. He claims that he started filing tax returns in 2002.

The respondent married the other respondent on February 6th of 1998. They have a daughter named Leslie, who was born on September 28th of 1998, and a son, born on May 7th of 2002. The documents submitted in Exhibit 4, Tab D, indicate that their daughter Leslie is in a Talented and Gifted program since third grade. She has apparently just finished the fourth grade. According to both respondents, she gets good grades and apparently has received honors.

Their daughter has visited Mexico twice: The first visit was in 2005, and then she visited Mexico in the summer of 2007. She apparently stayed with the male respondent's sister and the female respondent's mother for approximately one month. The testimony was that they speak Spanish at home, but that she speaks better English. The male respondent testified that she is in a bilingual program, but that most of her classes are in English.

The testimony was that if the respondents are deported, the two children would go back with them to Mexico. They both testified that they would

not have the same opportunities as they would have in the United States, especially because the daughter is in a gifted and talented program that could lead to better opportunities.

The female respondent states that she has seven siblings in the United States and a brother living in Mexico. Her father lives in Mexico. He is apparently not in the best health. Her mother is a lawful permanent resident, but visits Mexico frequently to help her father.

She testified that she goes to the teacher meetings. She states that both their son and daughter learn easily and that her daughter wants to be an astronaut. She states that her daughter goes to the program once a week for about three hours where she is taught more advanced things. She states that there will be not the same opportunities if they had to relocate to Puebla and that the home where her parents live would be a long drive away from the "good" schools, which would involve a long bus ride. She is concerned that if the children have to go back to Mexico, they would lose educational opportunities.

The Court also reviewed the State Department Report on Mexico. It states that the government generally respected and promoted human rights. There were problems with unlawful killings by security forces, kidnappings, physical abuse, overcrowded prison conditions, violence, and intimidation.

Statement of the Law

To qualify for cancellation of removal under Section 240A(b) (1) of the Act, the respondents must demonstrate physical presence for a period of not less than 10 years, good moral character, and that their removal would result in exceptional and extremely unusual hardship to a spouse, parent, or child who is a U.S. citizen or permanent resident. In evaluating whether exceptional and extremely unusual hardship has been established, the Court will be guided by the BIA decision in Matter of Monreal, 23 I&N Dec. 56 (BIA 2001) as well as Matter of Andazola, 23 I&N Dec. 319 (BIA 2002) and Matter of Recinas, 23 I&N Dec. 467 (BIA 2002).

Analysis and Findings

The Court finds that the respondents have demonstrated the requisite physical presence. There appears to be no good moral character issues as the male respondent was not convicted of statutory rape.

The issue in this case is whether the respondents have demonstrated that they their removal would result in exceptional and extremely unusual hardship to their U.S.citizen child. The Board of Immigration Appeals in the Matter of Monreal, Andazola, and Recinas cases held that Congress intended cancellation of removal to be available to non-permanent residents only in compelling cases. See Matter of Monreal, supra, at 59. Any sort of hardship, to meet that standard, must be substantially beyond the ordinary hardship that would be expected when a

close family member leaves this country and that cancellation of removal is to be limited to truly exceptional circumstances. See Matter of Monreal, supra, at 62.

To evaluate whether the standard has been met, the Court must consider the ages, health, and circumstances of the qualifying relatives. A lower standard of living or adverse country conditions in the country of return is considered only insofar as they may affect the qualifying relatives, but are generally insufficient, in themselves, to support a finding of exceptional and extremely unusual hardship. See Matter of Monreal, supra, at 63.

The issue in this case is whether the respondents have met that burden of proof of establishing that their removal would result in exceptional and extremely unusual hardship to their two United States-citizen children.

The record reflects that if the respondents had to go back to Mexico, their two U.S.-citizen children would follow them. The record reflects that the respondents have some family in Mexico, although it appears that the majority of their siblings live in the United States. The claim of exceptional and extremely unusual hardship is largely based on what would happen their daughter Leslie in terms of her educational opportunities if she had to go back to Mexico. The record reflects that the daughter speaks at least some Spanish and apparently has been taking some bilingual classes. The claim was their concern that any schools they would go to in Mexico would not meet the standards of what they would have in the United States and that she would have fewer educational opportunities in Mexico. The

record clearly reflects that their daughter, Leslie, is an intelligent and talented student who is currently going into the fifth grade. However, the record in this case does not clearly establish exactly what sort of educational opportunities there would be for her in Mexico. But certainly there would no doubt be a significant transition for her going back to Mexico and it certainly is obviously different from the type of schools in that country. But the Court would also note that Puebla is a fairly large city and there would certainly be at least some educational opportunities there.

The issue, therefore, in this case is whether the effect on her educational opportunities as well as the fact that the standard of living is lower in Mexico, would meet the definition of exceptional and extremely unusual. Unfortunately, it appears that this is the hardship that typically happens when children have to go back with their parents to a different country. There is no question that there would be some hardship to the daughter, especially considering that she is bright, and the Court acknowledges that there would be fewer educational opportunities than what she would have in the United States. But the Court finds that this does not meet the high bar set by Congress, which is exceptional and extremely unusual. Therefore, the Court finds that the respondents have not met their burden of proof.

The BIA looked at a similar case with children of similar ages in the Andazola case, 23 I&N Dec. 319 (BIA 2002). The Board in that case held that in a case where the respondent was unmarried and had no family in Mexico, the poor economic conditions and diminished educational opportunities did not

rise to the level of exceptional and extremely unusual. In both of these cases, unlike the Recinas case, it appears that the children have at least some familiarity with the Spanish language, they have some family in Mexico, and they would have two parents with them to support them if they had to go back to Mexico. Accordingly, based on the high standard set by Congress as well as the BIA case law, the Court finds that the respondents have failed to meet their burden of proof. The Court would note that they are obviously hard-working individuals, but the Court finds that they do not meet the burden of proof set forth by Congress.

The respondents have not opted to apply for voluntary departure. The Court has no other option but to order their removal to Mexico.

ORDERS

IT IS HEREBY ORDERED that the respondents' application for cancellation of removal under Section 240A(b)(1) of the Act is denied.

IT IS FURTHER ORDERED that the respondents be removed to Mexico.

MICHAEL W. STRAUS
Immigration Judge

APPENDIX D

Seal UNITED STATES COURT OF APPEALS
FILED
FEB 04 2010
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of February, two thousand ten,

Micaela Zacatelco Hijuilt, Jorge Rojas Cortes,

Petitioners,

v. 09-2832-ag

Eric H. Holder, Jr., United Status Attorney General,

Respondent.

Jorge Rojas Cortes and Micaela Zacatelco Hijuilt having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc,* and the panel that determined the appeal having considered the request for panel rehearing, and the active

members of the Court having considered the request for rehearing *en banc,*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: S/Catherine O'Hagan Wolfe